



Docket No.: SON-2968
(PATENT)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
Minoru Kawahara

Application No.: 10/813,175

Confirmation No.: 4461

Filed: March 31, 2004

Art Unit: 2627

For: RECORDING/ REPRODUCING DEVICE AND
METHOD, RECORDING MEDIUM, AND
PROGRAM

Examiner: P. H. Gupta

APPELLANT'S BRIEF

MS Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Madam:

This is an Appeal Brief under 37 C.F.R. §41.37 appealing the final decision of the Examiner dated December 23, 2008. Each of the topics required by 37 C.F.R. §41.37 is presented herewith and is labeled appropriately. This brief is in furtherance of the Final Office Action of December 23, 2008.

A Notice of Appeal was filed in this case on May 22, 2009, along with a Request for Panel Review. The Notice of Panel Decision from Pre-Appeal Brief Review dated July 7, 2009 ("the Decision") indicates that claims 1-15 remain rejected.

The Decision further indicates that the extendable time period for the filing of the Appellant's Brief will be reset to be one month from the mailing of the Decision. Accordingly, the filing of this Appellant's Brief is timely. 37 C.F.R. §1.136.

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I. REAL PARTY IN INTEREST

Sony Corporation is the real party in interest of the present application. An assignment of all rights in the present application to *Sony Corporation* was executed by the inventor and recorded by the U.S. Patent and Trademark Office at **reel 015678, frame 0806**.

II. RELATED APPEALS AND INTERFERENCES

There are no other appeals or interferences which will directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

III. STATUS OF CLAIMS

Within the Final Office Action of December 23, 2008:

Paragraph 2 indicates a rejection of claims 1-6, and 12-15 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate).

Paragraph 3 indicates a rejection of claims 7-9 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate) and in further view of U.S. Patent No. 6,937,549 (Nozaki).

Paragraph 4 indicates a rejection of claim 10 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate) and in further view of U.S. Patent Application Publication No. 2003/0161233 (Sako'233).

Paragraph 5 indicates a rejection of claim 11 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate), in further view of U.S.

Patent Application Publication No. 2003/0161233 (Sako'233), and in further view of U.S. Patent No. 5,995,704 (Shido).

Thus, the status of the claims is as follows:

Rejected: Claims 1-15

No claims are indicated within the Final Office Action to contain allowable subject matter.

Accordingly, Appellant hereby appeals the final rejection of claims 1-15 which are presented in the Claims Appendix.

IV. STATUS OF AMENDMENTS

Provided is a statement of the status of any amendment filed subsequent to final rejection.

Subsequent to the final rejection of December 23, 2008, no amendment has been filed in this case.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The following description is provided for illustrative purposes and is not intended to limit the scope of the invention. Reference is made to the Substitute specification filed on February 15, 2006.

1. A recording/reproducing device comprising:	
recording means for recording data on an information recording medium;	Paragraph [0056]
readout means for collectively reading out said data recorded on said information recording medium in units of a predetermined amount of data while the recording by said recording means is in progress; and	Paragraph [0056]
transmission means for transmitting said data read out by said readout means.	Paragraph [0056]

7. The recording/reproducing device according to claim 1, further comprising verification means for verifying the recording on said information recording medium based on said data stored by said storage means.	Paragraph [0035] Paragraph [0056]
10. The recording/reproducing device according to claim 1, further comprising setting means for setting at least one of an exhaustion limit value parameter and a frequency limit value parameter of collective readout for said readout of said data by said readout means in accordance with a communication speed.	Paragraph [0047] Paragraph [0131]
11. The recording/reproducing device according to claim 1, further comprising selection means for allowing a user to arbitrarily select at least one of an exhaustion limit value parameter and a frequency limit value parameter of collective readout for said readout of said data by said readout means.	Paragraph [0123]
13. A recording/reproducing method comprising:	
a recording step of recording data on an information recording medium;	Paragraph [0098]
a readout step of collectively reading out said data recorded on the information recording medium in units of a predetermined amount of data while the recording in said recording step is in progress; and	Paragraph [0100]
a transmission step of transmitting said data read out in said readout step.	Paragraph [0116]
14. A recording medium on which a program readable by a computer is recorded, said program comprising:	
a recording step of recording data on an information recording medium;	Paragraph [0098]
a readout step of collectively reading out said data recorded on said information recording medium in units of a predetermined amount of data while the recording in said recording step is in progress; and	Paragraph [0100]
a transmission step of transmitting said data read out in said readout step.	Paragraph [0116]
15. A program for making a computer execute a process comprising:	
a recording step of recording data on an information recording medium;	Paragraph [0098]
a readout step of collectively reading out said data recorded on said information recording medium in units of a predetermined amount of data while the recording in said recording step is in progress; and	Paragraph [0100]
a transmission step of transmitting said data read out in said readout step.	Paragraph [0116]

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The issues presented for consideration in this appeal are as follows:

- Whether the Examiner erred in rejecting claims 1-6, and 12-15 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate).
- Whether the Examiner erred in rejecting claims 7-9 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate) and in further view of U.S. Patent No. 6,937,549 (Nozaki).
- Whether the Examiner erred in rejecting claim 10 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate) and in further view of U.S. Patent Application Publication No. 2003/0161233 (Sako'233).
- Whether the Examiner erred in rejecting claim 11 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate), in further view of U.S. Patent Application Publication No. 2003/0161233 (Sako'233), and in further view of U.S. Patent No. 5,995,704 (Shido).

These issues will be discussed hereinbelow.

VII. ARGUMENT

In the Final Office Action of December 23, 2008:

The Examiner erred in rejecting claims 1-6, and 12-15 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate).

The Examiner erred in rejecting claims 7-9 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate) and in further view of U.S. Patent No. 6,937,549 (Nozaki).

The Examiner erred in rejecting claim 10 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate) and in further view of U.S. Patent Application Publication No. 2003/0161233 (Sako'233).

The Examiner erred in rejecting claim 11 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate), in further view of U.S. Patent Application Publication No. 2003/0161233 (Sako'233), and in further view of U.S. Patent No. 5,995,704 (Shido).

For at least the following reasons, Appellant submits that this rejection is both technically and legally unsound and should therefore be reversed.

For purposes of this appeal brief only, and without conceding the teachings of any prior art reference, the claims have been grouped as indicated below.

1. **The Examiner erred in rejecting claims 1-6, and 12-15 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate).**

Ten Kate

- a. **The Final Office Action fails to show the presence of all claimed features within Ten Kate.**

Instead, the rejection of the claims appears to be a combination under 35 U.S.C. §103 of Sako'942 and Ten Kate.

Sako'942

- b. **The Final Office Action fails to show the presence of all claimed features within Sako'942**

Final Office Action has concluded that **Sako does not teach:**

Reading back data while the recording of said data by said recording means is in progress (Final Office Action at page 2);

Verification means for verifying the recording on said information recording medium based on said data stored by said storage means (Final Office Action at page 5);

Setting means for setting at least one of an exhaustion limit value parameter and a frequency limit value parameter of collective readout for said readout of said data by said readout means in accordance with a communication speed (Final Office Action at page 6);

Selection means to select at least one of an exhaustion limit value parameter and a frequency limit value parameter of collective readout for said readout of said data by said readout means (Final Office Action at pages 6-7).

c. No benefit of the international filing date of Sako'942

Sako'942 has a PCT filing date of July 29, 2002.

However, Sako'942 is in the national stage (35 U.S.C. 371) of an International Application filed on or after November 29, 2000 and which was not published in English under PCT Article 21(2).

According to 35 U.S.C. 102 (e), no benefit of the international filing date (nor any U.S. filing dates prior to the IA) is given for 35 U.S.C. 102 (e) prior art purposes if the IA was published under PCT Article 21(2) in a language other than English, regardless of whether the international application entered the national stage. See M.P.E.P. §706.02(f)(1).

d. The effective filing date of the instant application is earlier than the publication date of Sako'942

Sako'942 has a publication date of February 12, 2004.

The instant application has a filing date of March 31, 2004.

In this regard, filing date of March 31, 2004 for the instant application is later than the publication date of February 12, 2004 for Sako'942.

The Final Office Action asserts that reference Sako et al. additionally qualifies as prior art under another subsection of 35 U.S.C. 102, and therefore, is not disqualified as prior art under 35 U.S.C. 103(c) (Final Office Action as pages 7-8).

As a reply to the Final Office Action, the Second Response to Final Office Action filed on March 23, 2009 notes that the above-identified application is entitled to benefit of the filing date for Japanese Patent Application No. 2003-101584 of April 4, 2003.

Here, the filing date for Japanese Patent Application No. 2003-101584 of April 4, 2003 in the present application is earlier than the publication date of February 12, 2004 for Sako'942.

The Advisory Action of April 29, 2009 contends that *Applicant cannot rely upon the foreign priority papers to overcome this rejection because a translation of said papers has not been made of record in accordance with 37 CFR 1.55*. See MPEP §201.15.

In response to the Advisory Action of April 29, 2009, a clean copy of a certified English translation of Japanese Patent Application No. 2003-101584 has been provided to the U.S. Patent and Trademark Office on May 22, 2009.

Nevertheless, page 2 the Advisory Action of July 7, 2009 asserts that *the Certified translation filed improperly, would require further consideration under 35 U.S.C. §112 1st paragraph for claims 1-15*.

In response, all evidence of nonobviousness must be considered when assessing patentability. *Richardson-Vicks Inc. v. The Upjohn Co.*, 44 USPQ2d 1181, 1186 (Fed. Cir. 1997).

Here, the instant application is entitled to benefit of the filing date for Japanese Patent Application No. 2003-101584 of April 4, 2003.

As noted hereinabove, the filing date for Japanese Patent Application No. 2003-101584 of **April 4, 2003** in the present application is earlier than the publication date of **February 12, 2004** for Sako'942.

Thus, Sako'942 appears to be unavailable as prior art and that the rejection of the claims using this reference should be withdrawn as a result. MPEP § 201.15.

e. The instant application and Sako'942 are commonly owned

In addition, the instant application was filed after November 29, 1999.

Sony Corporation is the real party in interest of Sako'942. An assignment of all rights in Sako'942 to *Sony Corporation* was executed by the inventor and recorded by the U.S. Patent and Trademark Office at reel 014365, frame 0065.

Furthermore, **Sony Corporation is also the real party in interest of the instant application.** An assignment of all rights in the present application to *Sony Corporation* was executed by the inventor and recorded by the U.S. Patent and Trademark Office at reel 015678, frame 0806.

The Final Office Action acknowledges that Applicant **has provided evidence** in this file showing that the invention was owned by, or subject to an obligation of assignment to, the same entity as Sako et al. at the time this invention was made, or was subject to a joint research agreement at the time this invention was made (Final Office Action at page 7).

U.S. patent practice pursuant to 35 U.S.C. §103(c)(1) provides as follows:

(c)(1) Subject matter developed by another person, **which qualifies as prior art only under one or more of subsections (e), (f), and (g) of section 102 of this title**, shall not preclude patentability under this section where the subject matter and the claimed

invention were, at the time the claimed invention was made, owned by the same person or subject to an obligation of assignment to the same person.

But pursuant to 35 U.S.C. §103(c) and M.P.E.P §706.02(l)(1), Sako'942 is also disqualified as prior art for the purpose of a rejection under 35 U.S.C. §103.

2. The Examiner erred in rejecting claims 7-9 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate) and in further view of U.S. Patent No. 6,937,549 (Nozaki).

Sako'942 and Ten Kate – For the purposes of brevity, arguments presented hereinabove regarding Sako'942 and Ten Kate are incorporated by reference.

Nozaki

- a. The Final Office Action fails to show the presence of all claimed features within Nozaki

Instead, the rejection of the claims appears to be a combination under 35 U.S.C. §103 of Sako'942, Ten Kate, and Nozaki.

- b. No benefit of the international filing date of Nozaki

Nozaki has a PCT filing date of April 11, 2002.

However, Nozaki is in the national stage (35 U.S.C. 371) of an International Application filed on or after November 29, 2000 and which was not published in English under PCT Article 21(2).

According to 35 U.S.C. 102 (e), no benefit of the international filing date (nor any U.S. filing dates prior to the IA) is given for 35 U.S.C. 102 (e) prior art purposes if the IA was published under PCT Article 21(2) in a language other than English, regardless of whether the international application entered the national stage. See M.P.E.P. §706.02(f)(1).

- c. **The effective filing date of the instant application is earlier than the issue date of Nozaki**

Nozaki has an issue date of August 30, 2005.

The instant application has a filing date of March 31, 2004.

In this regard, filing date of March 31, 2004 for the instant application is earlier than the issue date of August 30, 2005 for Nozaki.

- d. **The instant application and Nozaki are commonly owned**

In addition, the instant application was filed after November 29, 1999.

Sony Corporation is the real party in interest of Nozaki. An assignment of all rights in Nozaki to *Sony Corporation* was executed by the inventor and recorded by the U.S. Patent and Trademark Office at reel 014082, frame 0957.

Furthermore, *Sony Corporation is also the real party in interest of the instant application.* An assignment of all rights in the present application to *Sony Corporation* was executed by the inventor and recorded by the U.S. Patent and Trademark Office at reel 015678, frame 0806.

Pursuant to 35 U.S.C. §103(c) and M.P.E.P §706.02(l)(1), *Nozaki is also disqualified as prior art* for the purpose of a rejection under 35 U.S.C. §103.

3. **The Examiner erred in rejecting claim 10 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate) and in further view of U.S. Patent Application Publication No. 2003/0161233 (Sako'233).**

Sako'942 and Ten Kate – For the purposes of brevity, arguments presented hereinabove regarding Sako'942 and Ten Kate are incorporated by reference.

Sako'233

- a. **No benefit of the international filing date of Sako'233**

Sako'233 has a PCT filing date of May 24, 2002.

However, Sako'233 is in the national stage (35 U.S.C. 371) of an International Application filed on or after November 29, 2000 and which was not published in English under PCT Article 21(2).

According to 35 U.S.C. 102 (e), *no benefit of the international filing date* (nor any U.S. filing dates prior to the IA) is given for 35 U.S.C. 102 (e) prior art purposes if the IA was published

under PCT Article 21(2) in a language other than English, regardless of whether the international application entered the national stage. See M.P.E.P. §706.02(f)(1).

b. The effective filing date of the instant application is earlier than the publication date of Sako'233

Sako'233 has a publication date of August 28, 2003.

The instant application has a filing date of March 31, 2004.

In this regard, filing date of March 31, 2004 for the instant application is later than the publication date of August 28, 2003 for Sako'233.

The Final Office Action asserts that reference Sako et al. additionally qualifies as prior art under another subsection of 35 U.S.C. 102, and therefore, is not disqualified as prior art under 35 U.S.C. 103(c) (Final Office Action as pages 7-8).

As a reply to the Final Office Action, the Second Response to Final Office Action filed on March 23, 2009 notes that the above-identified application is entitled to benefit of the filing date for Japanese Patent Application No. 2003-101584 of April 4, 2003.

Here, the filing date for Japanese Patent Application No. 2003-101584 of April 4, 2003 in the present application is earlier than the publication date of August 28, 2003 for Sako'233.

The Advisory Action of April 29, 2009 contends that *Applicant cannot rely upon the foreign priority papers to overcome this rejection because a translation of said papers has not been made of record in accordance with 37 CFR 1.55*. See MPEP §201.15.

In response to the Advisory Action of April 29, 2009, a clean copy of a certified English translation of Japanese Patent Application No. 2003-101584 has been provided to the U.S. Patent and Trademark Office on May 22, 2009.

Nevertheless, page 2 the Advisory Action of July 7, 2009 asserts that *the Certified translation filed improperly, would require further consideration under 35 U.S.C. §112 1st paragraph for claims 1-15.*

In response, all evidence of nonobviousness must be considered when assessing patentability. *Richardson-Vicks Inc. v. The Upjohn Co.*, 44 USPQ2d 1181, 1186 (Fed. Cir. 1997).

Here, the instant application is entitled to benefit of the filing date for Japanese Patent Application No. 2003-101584 of April 4, 2003.

As noted hereinabove, the filing date for Japanese Patent Application No. 2003-101584 of April 4, 2003 in the present application is earlier than the publication date of August 28, 2003 for Sako'233.

Thus, Sako'233 appears to be unavailable as prior art and that the rejection of the claims using this reference should be withdrawn as a result. MPEP § 201.15.

c. The instant application and Sako'233 are commonly owned

In addition, the instant application was filed after November 29, 1999.

Sony Corporation is the real party in interest of Sako'233. An assignment of all rights in Sako'233 to *Sony Corporation* was executed by the inventor and recorded by the U.S. Patent and Trademark Office at reel 014092, frame 0386.

Furthermore, *Sony Corporation is also the real party in interest of the instant application.* An assignment of all rights in the present application to *Sony Corporation* was executed by the inventor and recorded by the U.S. Patent and Trademark Office at reel 015678, frame 0806.

Pursuant to 35 U.S.C. §103(c) and M.P.E.P §706.02(l)(1), *Sako'233 is also disqualified as prior art* for the purpose of a rejection under 35 U.S.C. §103.

4. The Examiner erred in rejecting claim 11 under 35 U.S.C. §103 as allegedly being unpatentable U.S. Patent Application Publication No. 2004/0027942 (Sako'942) in view of U.S. Patent No. 5,541,902 (Ten Kate), in further view of U.S. Patent Application Publication No. 2003/0161233 (Sako'233), and in further view of U.S. Patent No. 5,995,704 (Shido).

Sako'942, Ten Kate, and Sako'233 – For the purposes of brevity, arguments presented hereinabove regarding Sako'942, Ten Kate, and Sako'233 are incorporated by reference.

Shido

- a. The Final Office Action fails to show the presence of all claimed features within Shido

Instead, the rejection of the claims appears to be a combination under 35 U.S.C. §103 of Sako'942, Ten Kate, Sako'233, and Shido.

Conclusion

The claims are considered allowable for the same reasons discussed above, as well as for the additional features they recite.

Reversal of the Examiner's decision is respectfully requested.

If any fee is required or any overpayment made, the Commissioner is hereby authorized to charge the fee or credit the overpayment to Deposit Account # 18-0013.

Dated: August 6, 2009

Respectfully submitted,

By 

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Attorneys for Applicant

CLAIMS APPENDIX

1. A recording/reproducing device comprising:

recording means for recording data on an information recording medium;

readout means for collectively reading out said data recorded on said information recording medium in units of a predetermined amount of data while the recording by said recording means is in progress; and

transmission means for transmitting said data read out by said readout means.

2. The recording/reproducing device according to claim 1, wherein:

said recording means substantially simultaneously records first data at a high bit rate and second data at a lower bit rate than that of said first data, both data corresponding to a same material, on said information recording medium; and

said readout means collectively reads out said second data recorded on said information recording medium in units of a predetermined amount of data while the recording by said recording means is in progress.

3. The recording/reproducing device according to claim 1, wherein said recording means intermittently records said first data and said second data on a physically same track on said information recording medium.

4. The recording/reproducing device according to claim 1, wherein:

said recording means records said data on said information recording medium by a constant linear velocity method; and

said readout means reads out said data recorded on said information recording medium while keeping a linear velocity of the recording by said recording means.

5. The recording/reproducing device according to claim 1, further comprising storage means for temporarily storing said data to be recorded.

6. The recording/reproducing device according to claim 5, wherein, in a case where data to be transmitted is stored by said storage means, said readout means interrupts the readout of said data while said transmission means transmits said data stored by said storage means.

7. The recording/reproducing device according to claim 1, further comprising verification means for verifying the recording on said information recording medium based on said data stored by said storage means.

8. The recording/reproducing device according to claim 7, wherein said transmission means diverts and transmits said data stored by said storage means for verifying said recording on said information recording medium.

9. The recording/reproducing device according to claim 7, wherein said verification means skips verification of said recording on said information recording medium if excessive time cannot be ensured by the readout with said readout means.

10. The recording/reproducing device according to claim 1, further comprising setting means for setting at least one of an exhaustion limit value parameter and a frequency limit value parameter of collective readout for said readout of said data by said readout means in accordance with a communication speed.

11. The recording/reproducing device according to claim 1, further comprising selection means for allowing a user to arbitrarily select at least one of an exhaustion limit value parameter and a frequency limit value parameter of collective readout for said readout of said data by said readout means.

12. The recording/reproducing device according to claim 1, wherein said transmission means continues transmitting said data regardless of such a change of status as a start and an end of recording by said recording means.

13. A recording/reproducing method comprising:

a recording step of recording data on an information recording medium;

a readout step of collectively reading out said data recorded on the information recording medium in units of a predetermined amount of data while the recording in said recording step is in progress; and

a transmission step of transmitting said data read out in said readout step.

14. A recording medium on which a program readable by a computer is recorded, said program comprising:

a recording step of recording data on an information recording medium;

a readout step of collectively reading out said data recorded on said information recording medium in units of a predetermined amount of data while the recording in said recording step is in progress; and

a transmission step of transmitting said data read out in said readout step.

15. A program for making a computer execute a process comprising:

a recording step of recording data on an information recording medium;

a readout step of collectively reading out said data recorded on said information recording medium in units of a predetermined amount of data while the recording in said recording step is in progress; and

a transmission step of transmitting said data read out in said readout step.

EVIDENCE APPENDIX

A clean copy of a certified English translation of Japanese Patent Application No. 2003-101584 has been provided to the U.S. Patent and Trademark Office on May 22, 2009.

There is no other evidence which will directly affect or have a bearing on the Board's decision in this appeal.

RELATED PROCEEDINGS APPENDIX

A Petition Under 37 C.F.R. §1.181 to Request Withdrawal of the Final Office Action was filed on January 22, 2009.

There are no other appeals or interferences which will directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.